Supreme Court, U.S
FILED

No. 01 496 AUG 23 2001

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In the
Supreme Court of the United States

KURT E. JOHNSON,

Petitioner,

vs.

WILLIAM E. BOYD, Warden,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 99 C 7634 Date: May 23, 2000

Name of Assigned Judge: James B. Zagel

Case Title: United States of America
ex rel. Johnson v. Boyd

* * * *

DOCKET ENTRY:

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(10) X [Other docket entry] The state courts did not unreasonably interpret or apply prevailing federal law in approving Johnson's conviction, and his petition for a writ of habeas corpus is denied.

(11) X [For further detail see order on the reverse side of the original minute order.]

* * * *

[Reverse Side]

U.S. ex rel. Johnson v. Boyd 99 C 7634 Judge Zagel

Kurt E. Johnson was convicted of murder in Will County and sentenced to 38 years in prison. The conviction was affirmed on appeal and petition for leave to appeal was denied. Post-conviction relief was denied and appeals (including certiorari) were lost; exhaustion of state remedies is not disputed. He seeks habeas corpus on three grounds: (a) the trial court questioned jurors outside Johnson's presence, three of whom served on the jury and, had Johnson been present, he would have detected grounds for challenge; (b) trial counsel was ineffective for not advising Johnson of his right to be present during all jury questioning; (c) appellate counsel was ineffective for failing to order the jury selection transcript which would have led to the discovery of *in camera* questioning and also supported trial counsel's claim of *Batson v. Kentucky*, 476 U.S. 79 (1986), violations and appellate counsel was ineffective for failing to raise the jury issues on appeal. The AEDPA applies here. The ambit of review is a determination whether state court decisions were "contrary to, or involved an unreasonable application of, clearly established federal law as determined by" the United States Supreme Court. 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1495 (2000).

The state court found that Johnson's absence from some jury questioning was an issue that had been waived. The state court waiver decision must ordinarily be honored here. *White v. Peters*, 990 F.2d 338, 340 (7th Cir. 1993). Johnson can escape from the independent state law ground of waiver by attacking the competency

of counsel who made the waiver. And he does so by saying counsel was ineffective for failing to raise the claim in post-trial motions, for failing to inform Johnson of his right to be present and for waiving Johnson's presence in the first place. Only the last of these theories was raised in state post-conviction proceedings. The first two claims are waived under *O'Sullivan v. Boerckel,* 526 U.S. 838 (1999).

What is properly before me are the non-trivial claims that trial counsel was ineffective for waiving Johnson's presence during the voir dire and that appellate counsel was ineffective for failing to order the jury selection transcript leading in turn to the failure to pursue the *Batson* claims that trial counsel had made.

Johnson shot Michael Beshoar four times and killed him. Self-defense was claimed. This was not a stranger to stranger offense. There was a woman in the middle of it, an order of protection was entered against Johnson. There were arguments and fights. Johnson led the police on a high speed chase and told them that "she [Markel] was on cocaine and he went over there to settle something with her new boyfriend." Without going into the details, it suffices to say that the defense had little force. At the time of the confrontation Beshoar had an axe handle and attacked Johnson's car with it. Johnson said that Beshoar began to enter the vehicle to come after him and Johnson shot him. Johnson took off and said he came back to see if he had hit Beshoar. Beshoar got up and ran off. Johnson followed him (an act which, legally, probably destroyed his defense) and found him holding the axe handle. Beshoar struck him with the handle and Johnson shot him at least twice more. Against Johnson was the evidence of flight, the testimony of witnesses who saw him run toward Beshoar and did not see

Beshoar try to enter the car, and the animus that Johnson bore toward Beshoar (and perhaps Markel). The jury verdict against defendant was supported by the evidence. On appeal the focus of the defense argument was the admission of evidence of prior bad acts and other distasteful extrinsic acts by defendant along with the arguments of the prosecutor making use of such evidence. The Appellate Court judged that, since Johnson offered a defense that he believed Beshoar intended to kill him, Johnson's mental state (particularly motive) was in issue and his harassment of Markel (phone calls, vandalism, etc.) as well as his relationship to Markel were highly relevant. The Court found that Markel's testimony that she was afraid of Johnson and that Johnson threatened her employer went too far, but it was harmless. There were other issues on appeal but there is no reason here to recount them.

The same Appellate Court considered Johnson's post-conviction issues, indeed the panel included two of the same judges who sat on direct appeal. It found the voir dire outside the defendant's presence to be waived because there was no objection at trial and the issue was not raised in the post-trial motion. It considered whether plain error occurred and found no plain error, at least in part because Johnson's trial counsel had said at the relevant time that the voir dire outside of court would limit the adverse effects of pretrial publicity.

In deciding whether trial counsel's failure to object to the absence of his client or appeal counsel's failure to have the voir dire written up (at least, to present the *Batson* claim) was ineffective assistance of counsel, the court stated the correct constitutional standard. It regarded the decision to make inquiries of some jurors in the hallway as reasonable (or at least not proven to be

unreasonable) since its purpose was to ferret out from specific jurors their knowledge of pretrial publicity without the risk of contaminating the entire venire. On the *Batson* claim the Appellate Court cited appropriate precedent and concluded that a *prima facie* case of discrimination was not made out. The opinion stated:

"Defendant argues that 'the prosecution dismissed a Hispanic single woman juror with exactly the same background as the Hispanic single woman juror not peremptorily challenged.' While the two potential jurors had similar backgrounds, their personal histories and experiences with the criminal justice system were not identical. The decision to accept one . . . while rejecting a person of the same ethnicity and gender, merely raise the inference that the prosecution differentiated between the two potential jurors on the basis of some aspects of their employment, education or personal background. Since defendant's post-conviction petition failed to allege a *prima facie* case of discrimination, the trial judge properly dismissed the petition without an evidentiary hearing."[1] The court found there could be no prejudice from appellate counsel's failure to have the voir dire transcript written up.

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[1] The Hispanic juror example is the only one I can find in the petition for post-conviction relief. According to the prosecution briefs on appeal, the 30 member venire consisted of 80% women, 20% men, 13% black, 77% white and 10% Hispanic. The jury was 75% women, 25% men, 17% black, 17% Hispanic and 66% white. The prosecution made 8 peremptory challenges, 2 against black women, 1 against an Hispanic woman, 4 against white women and 1 against a white man. This is not, on its face, a promising scenario for a *prima facie* case of discrimination.

I find no grounds for finding that the decisions of the state courts were unreasonable within the meaning of the AEDPA. The premise of Johnson's first claim is that he must personally waive his presence at part of the voir dire, it is not something counsel may do for him. There is no law to support this claim. Counsel is empowered to waive (for acceptable tactical reasons such as those which exist in this case) many rights of the defendant without explicit consent of the defendant. Customarily, the decisions which have to be made by defendant are: which plea to enter, whether to waive a jury, whether to testify and whether to waive counsel. *United States v. Boyd*, 86 F.3d 719, 723 (7th Cir. 1996). "Critical stage" analysis, which is used by Johnson, is the basis for establishing that defendant has a right to counsel. See *e.g., United States v. Carrett*, 90 F.3d 210, 212 (7th Cir. 1996). Critical stage theory is not used to establish the right of the defendant to make a personal decision, recorded in open court, on this or that important matter. Many critical decisions, whether to cross-examine, whether to move for a mistrial, whether to mount a specific defense are largely remitted to defense counsel; this includes decisions on selection of a jury. *Boyd*, 86 F.3d at 723-724. Indeed, in federal court the presence of defendant at voir dire may be waived by counsel so long as he does so with the knowledge of his client, and it is nowhere alleged that Johnson was unaware of what his counsel was doing. See *United States v. Gagnon,* 470 U.S. 522 (1985).

The state courts did not unreasonably interpret or apply prevailing federal law in approving Johnson's conviction, and his petition for a writ of habeas corpus is denied.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 99 C 7634 Date: July 19, 2000

Name of Assigned Judge: James B. Zagel

Case Title: United States ex rel. Johnson v. Boyd

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DOCKET ENTRY:

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(10) X [Other docket entry] The application for a certificate of appealability is granted in part.

(11) X [For further detail see order on the reverse side of the original minute order.]

* * * *

[Reverse Side]

U.S. ex rel. Johnson v. Boyd 99 C 7634 Judge Zagel

I denied Johnson's petition for habeas corpus on May 23, 2000, for the following reasons: the state court's finding that Johnson waived the issue of his absence from jury questioning defaulted the substantive constitutional claim. *White v. Peters*, 990 F.2d 338 (7th Cir. 1993); the state court's *Strickland* analysis was not unreasonable in finding Johnson's counsel was not ineffective when he waived his client's presence during *voir dire*, and the state court's *Strickland* analysis was not unreasonable in finding no prejudice from appellate counsel's failure to have the jury *voir dire* transcript prepared.

Johnson now seeks a certificate of appealability which I grant in part. Reasonable jurists may debate whether a defendant must personally waive his presence during *voir dire* on the record; however the only way Johnson's claim is preserved for federal habeas is through his ineffective assistance of counsel argument. Therefore, I grant the certificate of appealability to the *Strickland* issue only (presented as Issue 3 in the application for a certificate of appealability at page 21). All other claims were adequately addressed by the state courts such that further, narrow habeas review would be fruitless.

The application for a certificate of appealability is granted in part.